



# STATE OF INDIANA

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November 16, 2012

Mr. Paul Straughn  
P.O. Box 502  
Mishawaka, Indiana 46546

*Re: Formal Complaint 12-FC-312; Alleged Violation of the Access to Public Records Act by the Indiana Attorney General*

Dear Mr. Straughn:

This advisory opinion is in response to your formal complaint alleging the Indiana Attorney General ("Attorney General") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Matt Light, Chief Counsel of Advisory and ADR Services Division, responded in writing on behalf of the Attorney General.

## BACKGROUND

In your formal complaint, you provide that on September 4, 2012, you submitted a written request for records to the Attorney General. The U.S. Postal Service confirmed delivery of the request by the Attorney General on September 6, 2012. On September 7, 2012, Mr. Light confirmed in writing the receipt of your request for records. On October 6, 2012, you inquired in writing regarding the status of your request and asked Mr. Light to immediately provide the requested records. On October 8, 2012, Mr. Light responded in writing to your inquiry and advised that the request was undergoing supervisory review and will be provided as soon as reasonably possible. On October 8, 2012, you replied to Mr. Light's response and advised that it was your contention that 30 days was a reasonable amount of time for the Attorney General to respond to your request, you requested the agency provide a partial disclosure of the responsive records, and for the names of those individuals participating in the review of the records that had been gathered. Your October 8, 2012 request was ignored.

As of October 16, 2012, the date that your formal complaint was filed with the Public Access Counselor's Office, you still have yet to receive any records that are responsive. You provide that the Attorney General has violated the APRA by failing to provide all records in a reasonable period of time and that your request to provide a partial disclosure was ignored. You maintain that the request is narrow and well-defined that pertains to a single employee.

In response to your formal complaint, Mr. Light advised that on October 18, 2012, one day after you filed your formal complaint, the Attorney General emailed and mailed copies of its final response to your September 6, 2012 request. The Attorney General received your request on September 6, 2012, to which on the following day it acknowledged its receipt in writing. Mr. Light advised that the request included 10 categories of records along with 9 sub-categories within those categories. The request was the fourth public records request of five that the Attorney General has received from you in 2012.

The records at issue involve various personnel and employment records relating to a specific employee. To prepare a thorough and accurate response, the Advisory Division had to speak and coordinate its efforts with the Licensing Enforcement and Homeowner Protection Division, Human Resources, and executive staff. Personnel records are governed under section 4(b)(8) of the APRA, and leaves disclosure decisions relating to certain portions of an employee's personnel file. Your request required discussions with Human Resources and supervisory staff to determine what the agency's practice has been with respect to exercising the discretion allowed under 4(b)(8) in order to ensure that your request was handled fairly and uniformly. Further, although not required under the APRA, the Attorney General concluded that it would be helpful and appropriate to provide narrative explanations in its response regarding measures taken to review the employment application of the employee in question.

In addition to responding to your and other public records request submitted to the Attorney General, the Advisory Division was also required to discharge its normal duties and responsibilities. Such duties include research and writing advisory opinions, drafting legislative policy and bills, reviewing state agency contracts, drafting all in-house contracts, reviewing state administrative rulemaking, advising agencies on administrative rulemaking functions, providing advice on a daily basis to various agencies, boards, and commissions in state government, advising professional and medical licensing boards in public hearings, serving as administrative law judges for various agencies, boards, and commissions, researching and drafting memorandum for the Attorney General and executive staff, preparing and updating educational and reference materials, and preparing and giving presentations at continuing legal education events and other training seminars.

The Advisory Division timely coordinated meetings to review, discuss, and work on the steps identified as being necessary to respond to your request. The steps include reviewing your request to properly understand what was being requested, reviewing earlier responses to identify portions that overlapped with previous requests, meeting with various employees of the Attorney General's office who supervise the employee in question, following up with the Human Resources, meeting with executive staff to discuss the discretionary disclosure and denial components and the possibility of adding additional explanations with the final response, responding to your request for a status update on the matter, and drafting the final response.

The APRA provides that the agency must provide the records within a reasonable period of time after receiving the request. Factors to be considered include the nature of the request, how broad or narrow the request is, how old the records are, and whether the records must be reviewed prior to disclosure. Mr. Light would maintain that your request was broad, lengthy, multi-faceted, and in several respects overlapping. As the records were maintained in the employees personnel file, they need to be reviewed and analyzed in light of the discretionary power provided to public agencies under 4(b)(8). In addition to responding to public records requests, the Attorney General was required to maintain the normal duties and responsibilities of the agency. All responses were provided to you on October 18, 2012, which was 42 calendar days and 29 business days after it was received. Considering all such facts, Mr. Light advised that all responses were provided to you in a reasonable period of time.

### ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The Attorney General is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Attorney General’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Here, the Attorney General received your written request for records via certified mail on September 6, 2012, to which the agency acknowledged its receipt in writing on September 7, 2012. As such, it is my opinion that the Attorney General complied with the requirements of section 9(b) in response to your request.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered in determining if the requirements of section 3(a) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any

material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

Your original request for records was received on September 6, 2012, to which the Attorney General produced its final response on October 18, 2012. After reviewing the original request and the Attorney General's final response, although the request did not produce a vast array of records, it is my opinion that the request itself was broad in light of the ten categories of records that were sought. During the pendency of collecting and reviewing any records that were responsive to your request, Mr. Light responded to your inquiry regarding the status of the request in two days and complied with the requirements of section 9(b) of the APRA in acknowledging the requests' receipt. Although our office has suggested that a public agency make periodic disclosures when a large number of documents are being reviewed, an agency would not violate the APRA by failing to provide such disclosures, nor would such disclosures be appropriate in all cases. As provided here, the Attorney General supplemented its responses with narrative explanations in order to provide guidance and clarity, a step not required under the APRA and which would demonstrate why a periodic disclosure as to your request would have only caused confusion. Further, an agency is not required to create a list of individuals responsible for participating in the review of the records that are to be disclosed.

As the majority of your request sought records maintained in a specific employees' personnel file, the Attorney General was required to review all records that were responsive to your request as personnel records are generally disclosed at the discretion of the agency, minus the requirements provided under I.C. § 5-14-3-4(b)(8). The Attorney General was thus required to carefully review the records to ensure that any denial would not be considered arbitrary and capricious. In addition to diligently working on producing the final response to your request, the Attorney General was required to work on all other public records requests submitted and maintain its normal duties and responsibilities. In light of all of these factors and that the Attorney General has issued its final production of records, it is my opinion that the Attorney General complied with the requirements of section 3(b) of the APRA by providing all records that were responsive to your request within a reasonable period of time.

## CONCLUSION

For the foregoing reasons, it is my opinion Attorney General complied with the requirements of section 3(b) of the APRA by providing all records that were responsive to your request within a reasonable period of time.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage  
Public Access Counselor

cc: Matt Light